Supreme Court, U. S.
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No. 97-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES W. WOODSON,

Petitioner,

v.

SCOTT PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Third Circuit Court of Appeals correctly conclude that Section 107(a) of the Civil Rights Act of 1991, requiring a plaintiff to establish that status-based discrimination was merely "a motivating factor" in the adverse employment action, does not apply to Title VII retaliation claims, where the text of Section 107(a) excludes any reference to retaliation claims and its legislative history indicates that it was intended only to apply to status-based discrimination claims?

2. Did the Third Circuit Court of Appeals correctly conclude that the harmless error formulation first articulated by this Court in a criminal case, *Kotteakos v. United States,* 328 U.S. 750 (1946), applies in civil cases, where the statute and the rules governing appellate review make no distinction between civil and criminal cases?

RULE 29.6 STATEMENT

In 1996, Respondent Scott Paper Company merged with a wholly-owned subsidiary of Kimberly Clark Corporation, a publicly traded company. Scott Paper Company then changed its name to Kimberly Clark Tissue Company, and continues to operate as a wholly-owned subsidiary of Kimberly Clark Corporation. The new entity, Kimberly Clark Tissue Company, has no publicly traded subsidiaries or other parents.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Scott Paper Company ("Scott" or the "Company") respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on April 3, 1997.

OPINIONS BELOW

The opinion of the court of appeals is reported at 109 F.3d 913 (CA3 1997). The opinion of the district court is reported at 898 F. Supp. 298 (E.D. Pa. 1995).

JURISDICTION

The court of appeals entered its judgment on April 3, 1997. The order of the court of appeals denying rehearing was entered on May 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

In January 1992, Petitioner James Woodson was discharged from his position with Respondent Scott Paper Company ("Scott" or the "Company") as a result of a company-wide reduction in force. More than 250 other Scott employees lost their jobs in connection with the reduction in force. In a Complaint filed November 11, 1993, Petitioner alleged that the decision to discharge him was made because of his race and in retaliation for filing discrimination complaints in 1989 and 1990, two years prior to his discharge, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended ("Title VII"), and the Pennsylvania Human Relations Act ("PHRA"), Pa. Stat. Ann. tit. 43, § 951 *et seq.*

Petitioner began working for Scott in 1970 and was transferred to the Company's Chester, Pennsylvania plant in 1983 in a Technical Manager position. After enjoying two promotions in five years, Petitioner performed poorly in an interview process in 1988 for a further promotion to a Product System Leader position. His failure to obtain that promotion, as well as promotion to two General Manager and one other Product System Leader positions which thereafter opened, led him to file two discrimination complaints with the Pennsylvania Human Relations Commission ("PHRC"). Little to no activity took place on those complaints, and they remained pending, albeit dormant, at the time of Petitioner's discharge.

In October 1990, eight months after he filed his second PHRC complaint, Petitioner was promoted by his direct supervisor, James Peiffer, the Chester Plant Manager, to the "Napkins" Product System Leader position in the Chester plant after Petitioner successfully completed a competitive "situational interview" process. Both Mr. Peiffer and Petitioner testified that Petitioner was selected for the difficult

Napkins job because of his background with napkin finishing, and because Petitioner was, in Peiffer's view, "probably the only person at Scott Paper who could turn napkins around." Between February 1990, when Woodson filed his second PHRC complaint, and January 1992, when Woodson was discharged, he received the Napkins promotion, numerous salary increases (including a $6000 lump sum increase with his promotion), stock options, and special achievement awards.

In 1991, the Chester plant employed approximately 1,800 salaried and hourly employees. In June or July of that year, while serving as weekend manager on call, Woodson observed anonymous racial graffiti spray-painted on the wall of one of the men's bathrooms in the Chester plant. The bathroom was not near Woodson's Napkins product system and the graffiti did not mention Woodson's name.[1]

Contrary to the claims in the instant petition that Scott "took no reasonably adequate action" to respond to the graffiti, Scott in fact hired a private investigator to perform a complete investigation of the incident. Scott also commissioned a joint management and union task team at the Chester plant to address issues raised by the graffiti, and published immediately a notice condemning the graffiti. The task team sent out questionnaires to all employees in August or September of 1991 and instituted a training program regarding EEO issues in the second quarter of 1992.

In November 1991, Scott implemented a company-wide "Cost Reduction Program," which required for the first time the forced rating and ranking of all salaried employees across designated work groups. Of the twenty-seven employees within the Product System Leader work group, Petitioner was rated and ranked twenty-fifth. The bottom five individuals, including Petitioner, were selected for discharge. Of the sixteen executive, plant, and staff-level managers selected for dis-

1. Petitioner incorrectly contends that the graffiti must have been directed at him because he was the "only new black management employee" at the Chester plant at the time. Petitioner was not a "new" manager, having been in a managerial position at that plant since 1983, and was not the only black manager at the Chester plant.

charge throughout the manufacturing business, fourteen were white, and two (including Petitioner) were black.

Petitioner's claims were tried before a jury in the United States District Court for the Eastern District of Pennsylvania from February 7-15, 1995. Over Scott's objection, the district court instructed the jury to find for Woodson if he proved *merely* "that race or retaliation was a motivating factor, a factor that played a role in the employment decision to terminate him," and refused to instruct that Woodson's burden included proving that his race or retaliation had "a determinative effect" on his discharge. The district court also improperly instructed the jury that evidence of race-biased graffiti could be used as *direct evidence* of Scott's intent to discriminate. Scott specifically objected to the district court's "a motivating factor" and "graffiti" instructions. The district court chose not to amend its instructions.

The jury returned a verdict through a special verdict form in favor of Petitioner on the retaliation claim, and in favor of Scott on the race discrimination claim. Scott timely filed and served its Post-Trial Motion under Federal Rules of Civil Procedure 50 and 59, and reasserted each of the arguments raised in its Motion for Judgment as a Matter of Law presented at the close of the evidence. In addition, Scott's Post-Trial Motion sought a new trial in light of erroneous and prejudicial jury instructions given by the district court on the retaliation claim. On August 7, 1995, the district court denied in substantial part Scott's motion, and entered judgment against Scott in the amount of $1,496,698.70.

Scott timely appealed this decision to the Third Circuit Court of Appeals, which in turn rendered its decision on April 3, 1997. While agreeing that Scott was not entitled to judgment as a matter of law on the retaliation claim, the Third Circuit Court of Appeals remanded for a new trial on this claim because of the two serious errors in the jury instructions identified by Scott, namely: (1) the improper use of the "a motivating factor" causation language of Section 107(a) of the Civil Rights Act of 1991 for the retaliation claim; and (2) the

improper instruction permitting the jury to use the graffiti incident as "direct evidence" of discriminatory animus.[2]

Petitioner's Petition for Rehearing and his Suggestion for Rehearing *En Banc* were denied by the Third Circuit Court of Appeals on May 6, 1997.

SUMMARY OF REASONS FOR DENYING THE PETITION

The granting of a writ of certiorari in this case is not warranted. The Third Circuit Court of Appeals properly held, as had the First Circuit Court of Appeals in an earlier decision, that the causation standard set forth in Section 107(a) of the Civil Rights Act does not apply to Title VII retaliation claims. Retaliation claims are explicitly governed by a separate provision of Title VII and are not referenced in any manner in Section 107(a). Moreover, the legislative history of Section 107(a) makes clear that the amendment was only intended to address status-based discrimination claims. The Third Circuit Court of Appeals' reasoning is sound, and contrary to Petitioner's assertions, there is no split among the courts of appeals on this issue that requires resolution by this Court.

The Third Circuit Court of Appeals also properly concluded that two serious jury instruction errors were not harmless and warranted remand for a new trial on Petitioner's retaliation claim. Petitioner claims that the harmless error standard used by the court of appeals, based on this Court's formulation in a criminal case, is improper in a civil case and is in conflict with other courts of appeals. The use of slightly different gradations of the harmless error standard does not create the kind of serious conflict among the courts of appeals or raise an important question of federal law that would warrant this Court's intervention. Moreover, the Third Circuit Court of Appeals' use of the same harmless error formulation for civil and criminal cases comports with the uniform standards of appellate review articulated in the applicable statute

2. The court of appeals also reversed and directed the district court to enter judgment in Scott's favor on the PHRA claim. This portion of the decision is not raised by Petitioner in the instant petition.

and rules. Finally, no review is necessary because the two errors identified by the appeals court were serious enough to require reversal and remand under any harmless error formulation.

REASONS FOR DENYING THE PETITION

I. This Court Should Deny The Petition For Writ Of Certiorari On The Issue Of Whether Section 107(a) Of The Civil Rights Act Of 1991 Applies To Retaliation Claims.

In its decision below, the Third Circuit Court of Appeals, following the First Circuit Court of Appeals, held that the causation standard set forth in Section 107(a) of the Civil Rights Act of 1991 did not apply to Title VII retaliation claims.[3] Contrary to Petitioner's contentions, there is no split of authority among the courts of appeals on this issue that would warrant this Court's review. Moreover, the plain language of the amendment, combined with its legislative history, leaves no doubt that the position of the Third and First Circuit Courts of Appeals is correct.

A. There Is No Split Of Authority Among The Courts Of Appeals On This Issue.

Petitioner represents to this Court that there is a "clear split in the decisional law of the circuits" on the applicability of Section 107(a) to retaliation claims. Br. of Pet'r at 13. This is simply not an accurate statement. The only two courts of appeals to analyze meaningfully this issue are the First Circuit, in *Tanca v. Nordberg,* 98 F.3d 680 (CA1 1996), *cert. denied,* 117 S. Ct. 1253 (1997), and the Third Circuit in the instant

3. As discussed more fully below, Section 107(a) of the 1991 Civil Rights Act, codified at 42 U.S.C. § 2000e-2(m), provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). Title VII contains a separate section prohibiting retaliation against, *inter alia,* persons who oppose discriminatory employment practices. 42 U.S.C. § 2000e-3.

case, *Woodson v. Scott Paper Co.*, 109 F.3d 913 (CA3 1997). Both of these courts concluded, after lengthy analysis, that Section 107(a) did not apply to Title VII retaliation claims. *Tanca*, 98 F.3d at 684; *Woodson*, 109 F.3d at 934. Accordingly, there is no "real and embarrassing conflict of opinion and authority" among the courts of appeals that would warrant review by this Court. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (citation omitted).

Petitioner bases his purported "clear conflict" on the decision of the Fourth Circuit Court of Appeals in *Beinlich v. Curry Development, Inc.*, No. 94-1465, 1995 WL 311577 (CA4 May 22, 1995), and the decision of the Seventh Circuit Court of Appeals in *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881 (CA7 1996). Neither case supports his contention. First, *Beinlich's* precedential value is severely limited by the fact that it is an unpublished disposition. Fourth Circuit Local Rule 36(c), cited prominently at the top of the *Beinlich* decision, disfavors the use of unpublished dispositions except to establish res judicata, estoppel, or law of the case. Even if *Beinlich* were properly cited for present purposes, the decision itself does not adopt clearly Section 107(a)'s "a motivating factor" language for retaliation claims and provides absolutely no discussion of the issue. The decision simply cites *both* Section 107(a) and Title VII's retaliation section, 42 U.S.C. § 2000e-3(a), but fails to explain which causation standard it is applying. *Beinlich*, 1995 WL 311577, at *3. Accordingly, *Beinlich* hardly places the Fourth Circuit in "clear conflict" with the First and Third Circuits.

The same can be said about the Seventh Circuit Court of Appeals' decision in *Veprinsky*. Unlike the instant case, *Veprinsky* involved direct evidence that a retaliatory motive influenced the adverse employment action. 87 F.3d at 893. Therefore, there was no dispute that an improper motive was at least "a motivating factor" in the decision. Accordingly, the focus of the decision was whether the employer would have made the same decision absent the retaliatory motive. As a result, the court made only two passing references to Section 107(a), with no discussion as to its application to retaliation claims. *Id.* at 893-94. *Veprinsky* simply does not put the Sev-

enth Circuit in "clear conflict" with the First and Third Circuits, especially with respect to a pretext retaliation claim such as that presented in the instant case.

The only decision to come to a clearly contrary conclusion than the First and Third Circuits on this issue is *Heywood v. Samaritan Health System*, 902 F. Supp. 1076 (D. Ariz. 1995). In that case, the district court first conceded that neither the specific language of Section 107(a), nor the House Report addressing it, includes any reference to retaliation, and that retaliatory discharge is specifically addressed in Section 704(a), 42 U.S.C. § 2000e-3. *Id.* at 1081. Nonetheless, the *Heywood* court, relying on its own assumptions about the "policy articulated in the amendment and in the House Reports," concluded that Section 107(a) applied to retaliation claims. *Id.* Clearly, the *Heywood* decision, based on dubious reasoning itself, does not portend a looming conflict in the courts of appeals on this issue.[4]

In sum, contrary to Petitioner's assertions, there is no clear split in the decisional law among the courts of appeals on the applicability of Section 107(a) to employment retaliation claims. Accordingly, this Court's intervention is not required, and the petition for writ of certiorari should be denied.

B. The Third Circuit Court Of Appeals Correctly Held That Section 107(a) Does Not Apply To Retaliation Claims.

In the decision below, the Third Circuit Court of Appeals correctly concluded that Section 107(a) "on its face does not apply to retaliation claims." *See Woodson*, 109 F.3d at 933; *see*

4. Nor do the other district court decisions cited by Petitioner make this issue ripe for this Court's review. *See Hall v. City of Brawley*, 887 F. Supp. 1333, 1345 (S.D. Cal. 1995) (applying without discussion the mixed motives analysis of Section 107(a) to retaliation claim); *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1316 (E.D. Pa. 1994) (summarily applying Section 107(a) to retaliation claim brought under the Americans with Disabilities Act); *Lewis v. American Foreign Serv. Line Ass'n*, 846 F. Supp. 71 (D.D.C. 1993) (retaliation claim arising under 42 U.S.C. § 1981); *Paape v. Wall Data Inc.*, 934 F. Supp. 969 (N.D. Ill. 1996) (no retaliation claim asserted).

also Tanca, 98 F.3d at 682 (citing the district court's conclusion that "nothing in the 1991 Act would appear to change any rule with respect to retaliation claims which existed prior to its enactment"). Indeed, Section 107(a) refers exclusively to status-based discrimination claims:

> **(m) Impermissible consideration of race, color, religion, sex or national origin in employment practices**
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin was a motivating factor* for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). The statute does not include "retaliation" among its list of factors that can constitute an unlawful employment practice. Instead, retaliation claims are defined under an entirely separate section of Title VII, at 42 U.S.C. § 2000e-3(a), and there is no reference to this provision in Section 107(a).

The Third Circuit Court of Appeals also found support for its conclusion in the fact that Congress has specifically incorporated the retaliation provision into other sections of Title VII, thereby suggesting that its failure to do so in Section 107(a) was intentional. *Woodson,* 109 F.3d at 934; 42 U.S.C. § 1981a(a)(1) (added by Section 102 of the 1991 Act, and providing for compensatory and punitive damages in Title VII "sole cause" discrimination *and* retaliation claims) and 42 U.S.C. § 2000e-5(g)(2)(A) (added by 1964 Civil Rights Act and limiting the availability of reinstatement and back pay in Title VII discrimination *and* retaliation claims).

Although resort to the legislative history is not necessary in light of Section 107(a)'s plain language, such a review does not lead to a contrary result. In fact, the relevant congressional committee reports show that in enacting Section 107(a) Congress was only concerned that "[t]he effectiveness of Title VII's ban on *discrimination on the basis of race, color, religion, sex or national origin* has been severely undercut by the recent

Supreme Court decision in *Price Waterhouse v. Hopkins.*" H.R. Rep. No. 102-40(I) ("H.R. Rep. I"), at 45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 (citation and footnote omitted) (emphasis added). The committee report also shows that Congress analyzed the *Price Waterhouse* decision thoroughly and concluded that "[l]egislation is needed to restore Title VII's comprehensive *ban on all impermissible consideration of race, color, religion, sex or national origin in employment.*" H.R. Rep. I, *reprinted in* 1991 U.S.C.C.A.N. at 585-86 (emphasis added and in original). Moreover, in H.R. Rep. No. 102-40(II), at 16-19 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 709-10, Congress expressly titled the report: "Clarifying Prohibition Against *Impermissible Consideration of Race, Color, Religion, Sex or National Origin* in Employment Practices." H.R. Rep. No. 102-40(II), at 16, *reprinted in* 1991 U.S.C.C.A.N. at 709 (emphasis added). The title does not refer to retaliation claims. In short, the legislative history makes clear that Section 107(a) was amended only to respond to *Price Waterhouse,* and there is no suggestion that it was intended to set a new causation standard for retaliation claims.

Petitioner also contends that the Third Circuit Court of Appeals' decision runs counter to the principle of uniformity in interpreting the various federal anti-discrimination statutes. Although it is generally true that the same standards of proof have been applied to the various statutes, such a principle does not require that the same standard of proof be applied to different sections of the same statute. Congress has delineated clearly status-based discrimination claims from retaliation claims, and there is no reason to treat them identically. While a good argument can be made to treat a Title VII retaliation claim identically to a retaliation claim under the Age Discrimination in Employment Act, the argument does not compel identical treatment of clearly distinct claims within each statute.

In sum, the Third Circuit Court of Appeals correctly held that Section 107(a) does not apply to retaliation claims. Accordingly, the petition for writ of certiorari on this issue should be denied.

II. This Court Should Deny The Petition For Writ Of Certiorari On The Issue Of Whether The Third Circuit Used The Proper Harmless Error Standard.

Petitioner contends that the Third Circuit Court of Appeals applied an incorrect harmless error standard in concluding that the two errors it found in the jury instructions warranted remand for a new trial. This Court should deny the petition for writ of certiorari based on these grounds for two independent reasons: (1) the use of slightly different formulations of the harmless error standard by the courts of appeals does not raise an "important question of federal law"; and (2) the Third Circuit Court of Appeals correctly remanded for a new trial because of the two pivotal jury instruction errors.

A. Marginally Different Formulations Of The Harmless Error Standard Are Not "An Important Question Of Federal Law" Warranting Supreme Court Review.

Petitioner seeks review of the Third Circuit Court of Appeals' decision because its formulation of the harmless error standard varies slightly from that employed by other courts of appeals. Simply put, this is not the type of important national issue that merits Supreme Court review.

The slightly different formulations of the harmless error standard employed by the courts of appeals generally can be grouped into two categories. One formulation relies on this Court's decision in *Kotteakos v. United States,* 328 U.S. 750, 776 (1946), a criminal conspiracy case, and treats an error as "harmless" only if the court finds that there is a "high probability" that the error did not contribute to the judgment. *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916, 927 (CA3 1985) (adopting "high probability" standard); *Conway v. Chemical Leaman Tank Lines, Inc.,* 525 F.2d 927, 930 (CA5 1976) (adopting "fair assurance" standard); *Aetna Cas. & Sur. Co. v. Gosdin,* 803 F.2d 1153, 1159 (CA11 1986) (same).

The second variation on this approach treats the error as harmless only if the court believes that it is "more probable than not" that the error did not contribute to the judgment. *Smith v. Chesapeake & Ohio Ry.,* 778 F.2d 384, 389 (CA7

1985) (applying a standard of whether the error "affected a party's right to a fair trial to a substantial degree"); *McIlroy v. Dittmer,* 732 F.2d 98, 105 (CA8 1984) (adopting "more probably than not" standard); *Haddad v. Lockheed Cal. Corp.,* 720 F.2d 1454, 1459 (CA9 1983) (adopting standard that jury's verdict "more probably than not" untainted by the error); *United States Indus., Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1252-53 (CA10 1988) (adopting "more probably than not" standard).

Although Petitioner attempts to characterize these variations as diametrically opposed approaches to harmless error, in point of fact they are mere "shades of grey" causing no great rift among the courts of appeals. Petitioner attempts to create this fissure by referring to the Third Circuit Court of Appeals' approach as the "criminal law harmless error standard," thereby linking it, at least implicitly, to the "beyond a reasonable doubt" burden of proof applicable at criminal trials. In *McQueeney,* however, the Third Circuit Court of Appeals specifically considered and rejected a more stringent harmless error approach akin to the "beyond a reasonable doubt" criminal burden of proof. 779 F.2d at 924. Instead, it settled on the intermediate "highly probable" standard, an approach only marginally more stringent than the "more probable than not" standard. *Id.* at 927.

The insignificance of this issue is reflected also in the lack of discussion it has generated among the courts of appeals. In fact, the issue has not been raised among the courts of appeals for nearly ten years, when the Tenth Circuit Court of Appeals made a passing reference to the variance in a footnote. *See United States Indus.,* 854 F.2d at 1252 n.39.

Moreover, there is no indication that slightly different articulations of the harmless error standard have led to injustice or confusion. Courts of appeals are simply performing their proper role of identifying error and then making a reasoned judgment as to whether the error is serious enough to subject the parties and the judicial system to the costs associated with reversal and remand. As this Court noted in *Kotteakos,* such review is not an easy task, and "[b]y its very nature no standard of perfection can be attained." 328 U.S. at 761.

Respondent respectfully suggests that the courts of appeals are appropriately performing their review function, regardless of the specific harmless error language invoked, and no intervention by this Court is necessary.

B. The Third Circuit Court Of Appeals Correctly Remanded For A New Trial, Regardless Of The Semantic Standard Used.

The Third Circuit Court of Appeals properly identified two serious errors in the jury instructions and concluded that it could not say, with high probability, that these errors did not affect the outcome of the case. Accordingly, it reversed and remanded for a new trial on the retaliation claim. Although this articulation of the harmless error standard was proper, these two errors were serious enough to require reversal and remand under any harmless error formulation.

First, it is apparent that the Third Circuit Court of Appeals' approach to harmless error, derived from this Court's decision in *Kotteakos,* is wholly proper in both civil and criminal cases. The statutory provision governing the standards of appellate review make no distinction between criminal and civil cases: "On the hearing of *any* appeal or writ of certiorari in *any* case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (emphasis added). Indeed, Justice Rutledge in *Kotteakos* specifically noted that the predecessor to Section 2111 made no distinction between civil and criminal cases. 328 U.S. at 757 n.9; *see also* 12 James Wm. Moore et al., Moore's Federal Practice § 61.02[3] (3d ed. 1997) (concluding that *Kotteakos* established the framework for *both* criminal and civil cases).

Moreover, Federal Rule of Civil Procedure 61 defines harmless error as that which "appears to the court inconsistent with substantial justice," while its criminal analogue, Federal Rule of Criminal Procedure 52(a) defines harmless error as those errors "affect[ing] substantial rights." Given this uniform treatment of harmless error in the statute and the rules, there is no basis to abandon the standard set forth in *Kottea-*

kos and make it more difficult to correct trial court errors in civil actions. Indeed, these concerns about institutional integrity were specifically addressed by the Third Circuit Court of Appeals in *McQueeney* when it adopted the *Kotteakos* standard for civil cases. *See McQueeney,* 779 F.2d at 927 ("By maintaining a moderately stringent, though not unreasonably high, standard in civil as well as criminal cases, we preserve a strong incentive for the district courts to minimize their errors, and we thereby bolster the integrity of the federal judicial process").

Even if this approach to harmless error is incorrect, it is immaterial for the instant petition because, under any harmless error formulation, the two jury instruction errors were serious enough to warrant reversal and remand. The first instruction with which the court found error read as follows:

> There was evidence of race-biased graffiti in a bathroom at the Chester plant. An employer that permits such graffiti to exist may be held responsible for the racial bias conveyed by it if it condones the graffiti or acquiesces in it. All of the facts and circumstances, including the employer's reaction, the steps, if any, taken by the employer to counteract the graffiti and what was reasonably required given the nature of the racial provocation, should be considered in deciding whether the employer's alleged lack of appropriate response bears on its racial attitude. In other words, *it is direct evidence of the employer's intent to discriminate.*

Woodson, 109 F.3d at 929 (emphasis added). The court of appeals found that this instruction, particularly its concluding sentence, might have suggested to the jury that the graffiti itself could constitute *direct evidence* of retaliatory intent, which, of course, would be a legally impermissible conclusion. *Id.* at 930. The court of appeals also found that the instruction could permit a juror to conclude impermissibly that Scott's response to the graffiti, if found to be inadequate, could constitute direct evidence of retaliatory intent. *Id.* At most, a finding of an inadequate response to the graffiti would constitute only circumstantial evidence of discriminatory animus. *Id.*

Moreover, the court of appeals noted that the graffiti evidence was the only specific piece of evidence that the district court mentioned in the charge, which may have led the jury to give it too much weight.

This erroneous jury instruction was not harmless under any formulation of the harmless error standard. The instruction, in effect, gave the jury permission to treat the mere appearance of bathroom graffiti as *direct* evidence that the Company was motivated by discriminatory animus. This is a very serious error, and even under the less stringent harmless error formulation, no court could conclude that the error "more probably than not" did not contribute to the judgment against Respondent.

The Third Circuit Court of Appeals also concluded that the jury was improperly instructed that it could hold Respondent liable for retaliation if it found that Petitioner's filing of complaints with the EEOC and the corresponding state agency was a "motivating factor" in the decision to discharge him. *Woodson*, 109 F.3d at 931. As discussed above, liability under Title VII for retaliation requires a plaintiff to show not only that retaliatory animus was a motivating factor, but also that it had a *determinative effect* on the adverse employment action. *Id.* at 932. The court of appeals concluded that this error, which went to the pivotal issue of causation on the retaliation claim, was not harmless. *Id.* at 935.

The court of appeals' evaluation of the error's effect was correct under any harmless error formulation. The district court's instruction dramatically lowered Petitioner's burden by removing his obligation to establish that retaliatory animus had a determinative effect on his discharge. Especially when linked to the erroneous graffiti instruction permitting the jury to treat that incident as direct evidence of retaliatory intent, it is possible that the jury found *some* retaliatory animus behind the discharge decision. Under the law, however, this is not sufficient to establish liability. The jury instruction misstated this crucial causation standard, and no court could conclude that such a serious error was harmless.

CONCLUSION

For the foregoing reasons, Respondent Scott Paper Company respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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